DO WE KNOW HOW TO PUNISH?

*Benjamin L. Apt**

All of the current prevailing theories of criminal punishment ultimately depend on some sort of normative argument to justify why the state may penalize people found guilty of crimes. Yet each of these theories lacks a strong epistemological foundation to explain how we can know what form punishments should take. This article analyzes the epistemological gaps in the predominant theories of punishment and finds that the putative epistemological sources they do use fall short of actual knowledge. The lack of an epistemological underpinning for punishment puts the very validity of punishment in doubt. Systems for quantifying punishment, such as proportionality and sentencing guidelines, only lend an appearance of knowledge to penalization. They are not true epistemological arguments. Although social norms may at first seem to provide the bases of the requisite knowledge, norms are themselves epistemically difficult to identify, let alone prove. The article concludes that a sound epistemological basis is intrinsically unattainable in the practice of criminal punishment. The best that we can achieve as an epistemologically justifiable punishment is to follow the regulative principle of "suitability" by relying on a mixture of social norms and specific empirical observation.

Keywords: *criminal punishment, criminal law, sentencing, jurisprudence*

*Benjamin L. Apt is an attorney with the U.S. Department of Labor, where he helps oversee the Criminal Enforcement program of the Employee Benefits Security Administration. Mr. Apt received his JD as well as his MA in International Relations from Boston University. He has an MTS from Harvard Divinity School and a BA from Amherst College. His research interests in law include the jurisprudence of rights and of criminal law, law of the European Union, and comparative constitutional law. Mr. Apt wishes to thank Alexandra Lord, David McCarthy, Margo London, and Joanne Omang for their clarifying questions and comments during the gestation of the manuscript.

New Criminal Law Review, Vol. 19, Number 3, pps 437–472. ISSN 1933-4192, electronic ISSN 1933-4206. DOI: 10.1525/nclr.2016.19.3.437.

INTRODUCTION

All the major theories of criminal punishment presume, if only implicitly, that we can know how criminals should be punished. The theories may not themselves recommend specific forms of punishment—they are more concerned with the purpose of punishment—but they assume punishment has a defensible purpose.[1] People will figure out the right ways to carry it out.

Whereas criminal laws are primarily a codification of a norm or practice,[2] combined with propositions about human behavior,[3] theories justifying criminal punishment derive from a mixture of norms and a much more extensive field of knowledge claims. They purport to explain what acts the state *should* carry out against convicted criminals. These arguments are really exhortations rather than verifiable propositions. None of them is able to indicate just how we *know* how we should punish. Indeed, none of them incorporates an epistemological theory for *how we could know* the right manner of punishment.[4]

If we cannot explain how we know what the proper practice of punishment is, we are hard put to defend the idea of punishment. A prescription of actions that cannot explain how it knows why the actions should be done, or just which actions ought to be done, is epistemologically vacuous.[5]

Crimes are typically defined according to the moral and social opprobrium of certain acts. Prevailing normative perceptions and demonstrable evidence of harm combine to be the source of knowledge for defining crimes.[6] Theories of punishment, however, must satisfy a more demanding

1. H.L.A. Hart characterizes all three rationales for criminal punishment (retribution, deterrence, reform) together as a "supreme value or objective" or "aim." He views them as distinct purposes for punishment. HART, PUNISHMENT AND RESPONSIBILITY 2–3 (1968).

2. Hans Kelsen, *On the Basis of Legal Validity*, 26 AM. J. JURIS. 178 (1981).

3. Kenneth W. Simons, *Topography of Moral and Criminal Law Norms*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 244 (R.A. Duff & Stuart P. Green eds., 2011).

4. For a general outline of the current trends in epistemology, see ROBERT AUDI, EPISTEMOLOGY: A CONTEMPORARY INTRODUCTION TO THE THEORY OF KNOWLEDGE (3d ed. 2011).

5. H.L.A. Hart made a trenchant comment relevant to this matter, even if he did not go on to explore the issue of knowledge and punishment more broadly: "It is in general true that we cannot infer from principles applied in deciding the severity of punishment what the aims of the system of punishment are or what sorts of conduct may justifiably be punished." H.L.A. HART, LAW, LIBERTY, AND MORALITY 37–38 (1963).

6. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343 (1983).

epistemological threshold because punishment is a state-sanctioned, teleological, and routine act. Indeed, it is a practice that would otherwise be reprehensible, were it not somehow—normatively and pragmatically—justified.

The argument that criminal punishment requires a basis in knowledge draws on the concept of "epistemic norms." The term has come, within a short period, to be a large tent, covering many variations. Its primary version is the "knowledge norm of assertion," which holds that a person should propound "that p only if you know that p."[7] A related "knowledge norm of action" stipulates that one "[t]reat the proposition that p [is] reason for acting only if you know that p."[8] Another variation on the epistemic norm is the "knowledge theory of practical reasoning," which allows for more subjective belief at some remove from objective, testable knowledge.[9] The principle common to all of these propositions is that intentional, purposive actions, actions that are justified by knowledge claims (hence, actions other than such internally justifying activities as creating art), must be rooted in knowledge. A corollary to this principle is that a person must acquire relevant knowledge as fully as possible before acting on a proposition.

In the context of criminal punishment, the knowledge norm of action requires that we know that punishment accomplishes its proposed purpose in relation to criminal acts. It is not sufficient to assert that punishment is unpleasant for the person punished or that the desire to punish a wrongdoer

7. Berit Brogaard, *Intellectual Flourishing as the Fundamental Epistemic Norm*, *in* EPISTEMIC NORMS: NEW ESSAYS ON ACTION, BELIEF, AND ASSERTION II, 12 (Clayton Littlejohn & John Turri eds., 2014). The idea is commonly traced to the work of Timothy Williamson, although its roots are older, going back at least to Max Black, *Saying and Disbelieving*, 13 ANALYSIS 25–33 (1952). *See* TIMOTHY WILLIAMSON, KNOWLEDGE AND ITS LIMITS (2000); John Turri, *Knowledge and Supererogatory Assertion*, 167 PHIL. STUD. 557 (2014).

8. The term comes from Berit Brogaard, in reference to the work of John Hawthorne and Jason Stanley. They, in turn, use the term "the Action-Knowledge Principle." Hawthorne and Stanley go on to explain: "The Action-Knowledge Principle makes immediate sense of our use of 'know' to criticize the actions of others. When someone acts on a belief that does not amount to knowledge, she violates the norm, and hence is subject to criticism. That is why we use epistemic vocabulary in criticizing the actions of others." John Hawthorne and Jason Stanley, *Knowledge and Action*, 105 J. PHIL. 571, 578 (10/2008).

9. Peter Baumann, *Knowledge, Practical Reasoning and Action*, III LOGOS & EPISTEME 7 (2012).

is satisfied through the execution of punishment. These are merely tautological propositions that stop short of the epistemic foundation required to justify punishing. Whether we assert that the criminal deserved the particular punishment he received or that it will affect his future behavior in a predictable way, we must have a genuine, defensible epistemic foundation.

This absence of an epistemic foundation in theories of punishment is a normative failing. We should know why we believe the state may legally subject criminals to treatments that we would reject as immoral were they committed in any other circumstances.[10] This epistemic deficiency is obscured by the presence, in each of the different theories of punishment, of some doctrine of how punishment is to be measured. Without going so far as stipulating the right forms of punishment, these various systems of measurement give the illusion of objective knowledge and precision. Although the topic of properly scaling punishment has a long history, the questions of how we can claim to know how much, and in what way, the state should punish crimes have not been sufficiently examined.

I. THE MISSING DIMENSION IN THE THEORIES OF PUNISHMENT

A. Retributivism

A common distinction for characterizing theories of punishment is to group them as either backward-looking or forward-looking. Retributivism is considered to be backward-looking because it focuses on the wrongfulness of the deed already done. Proponents of retributivism hold that the purpose of criminal punishment is to condemn the criminal act and to re-create for the criminal some of the pain that he caused his victims. There are disparate arguments within this general school of thought for why retribution should be carried out against criminals.[11] These include

10. David Dolinko, *Punishment*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 403 (John Deigh & David Dolinko eds., 2011). This is a well-established dilemma. See among recent commentators: RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); Michael D. Bayles, *Criminal Paternalism*, *in* THE LIMITS OF LAW, Nomos XV (J. Roland Pennock & John W. Chapman eds., 1974).

11. A clear summary of the broad range of retributive justifications for punishment can be found in Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1224–28.

the wish to inflict on the criminal the adverse treatment he deserves for his illegal and rebarbative actions,[12] the desire to communicate to the criminal society's social disgust, anger, and scorn for the immoral and illegal act,[13] or a combination of these positions.[14]

Richard Frase, a contemporary proponent of retributivism, albeit in its "limited" form, characterizes retributivism as a "deontological" theory. He maintains that punishment is "justified according to its inherent value—whether it is a good or bad thing in itself, regardless of whether the punishment yields good or bad consequences. Deontological principles are based on values of justice and fairness that are viewed as ends in themselves."[15] These deontological principles do not enunciate exactly what forms punishment must take. For that step, retributivism relies on proportionality to explain how severely one kind of crime should be treated as compared with others.

> Frase distinguishes between two versions of the constellation of deontological principles:
>
> Like all punishment goals, retribution and uniformity can each serve as either a positive or negative criterion. The positive versions typically view retribution as the primary or even exclusive goal of punishment—offenders are punished simply because they are blameworthy and deserve to be punished; the severity of their punishment should be no more and no less than they deserve (retributive proportionality); and equally blameworthy offenders should receive equally severe punishment (retributive uniformity or "parity"). The negative version of these deontological theories—"limiting" retributivism—merely sets outer limits on punishment imposed to achieve other (positive) goals (especially: crime control), thus producing a range of

12. Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 286 (2005).

13. R.A. Duff, *Responsibility, Restoration, and Retribution*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 63, 78–79 (Michael Tonry ed., 2011); JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1974).

14. Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 31–33 (2009). Moore explains that a wrongfulness, and concomitant blameworthiness, although grounds for punishment, are insufficient to justify penalization by the state. The state may punish only those actions that have been legally deemed to be criminal, and then only in accordance with the five constraints on the "legal moralist thesis."

15. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AN D PROCEDURES FOR A WORKABLE SYSTEM 8 (2013). *See, too*, Richard Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

> permissible severity for any given case. Sentences must not be excessively severe or excessively lenient from a desert perspective, and equally blameworthy offenders must not receive grossly unequal penalties.[16]

Under Frase's deontological schema, human acts bear a moral value. Thus one basis for setting proportionate punishment is the nature of the criminal act and the extent of the actor's malevolence. In other words, proportionality roughly attempts to quantify the *relative* degree of the combined *actus reus* and the *mens rea* of the particular crime to determine the right quantum of desert. From the qualitative condition of desert, proportionality can supposedly derive a quantitative—again, only relative—right measurement of punishment—whatever form that punishment may take.

For retributivism, the due *degree* punishment for a particular crime is predetermined: the severity of a punishment follows in relation to the criminal's blameworthiness, which refers to both the nature of the crime committed and the extent of an individual's involvement with that crime.[17] Desert refers to the correlation between the degree of a person's culpability or blameworthiness for a crime and appropriate punishment.[18] Punishment, in other words, should be proportionate to the desert of the criminal. It should be proportionate to his blameworthiness.

The fundamental logic to retributivism is: if we do not condemn intentional bad acts, then there is no distinction within social behavior between bad and good acts. Morality is hollow without expressed approval for the good and emphatic disapprobation for the bad. This is especially true when the actor committed an offensive (criminal) act that he knew was (likely) wrong, and his act was not motivated by any counterposed moral concern, as in the case of civil disobedience. In such instances, the bad actor is guilty of a criminal transgression. He is aware of the wrong he did, or should be, yet he chose to do it for his own enrichment or to satisfy his malicious impulse. Society will consequently condemn the act done because to do

16. *Ibid.*, 8–9.

17. *Ibid.*, 25–27. Frase recounts that debates over the problem of imprecision in sentencing center on supposed disparities and inequities in sentences given to different defendants for the same crime. He does not address the root imprecision of proportionality, which is how one knows just what punishment any crime should warrant.

18. Douglas Husak, *Why Punish the Deserving? in* The Philosophy of Criminal Law: Selected Essays 393 (Oxford University Press, 2010).

nothing is as good as condoning the act. Consequentialism, as we will see, agrees with this principle; there is no reason to discourage the repetition of an act if it was not unwonted in the first place.

The problem is that logic does not suffice as a substitute for knowledge. Retributivism is not clear about *how* we all know which acts are reprehensible and which are not. Instead, it assumes a self-evident, shared knowledge about moral wrongs. It relies on a strong moral knowledge, a normative foundationalism, yet fails to demonstrate just where that knowledge originates.

The pitfalls for retributivism lurking in legal nominalism, however, are severe. For one, a positive law does not replace a reliance on society's moral norms; it only relocates them in the authority of the state. Society defers to the state to determine what is wrong and what is right. Furthermore, the argument displaces the traditional (if mysterious) deontological system onto a human institution that will always be mutable, flawed, and vulnerable to machinations that would otherwise be considered criminal. Abandoning deontological norms in favor of legal positivism yields for retributivism no real solution to its epistemological challenge. The sacrifice is too great.

Retributivism is an encompassing philosophy of punishment. It explains: *what* must be punished—blameworthy acts; *why* crimes must be punished—because they are blameworthy; and *to what degree* they must be punished—in proportion to their blameworthiness. Yet this very completeness of retributivism is its weakness. One can *know* only insofar as one accepts a deontological system. It is a self-contained set of beliefs and propositions from the state that must be accepted. To know deontological principles, you must jump in. The blameworthiness of different acts can change over time as a society's values alter, which then necessitates a conforming reinterpretation of the deontological principles. In addition, there is no precise formula for quantifying blameworthiness for immoral acts outside of whatever is stipulated by the deontological system.

A fundamental difficulty with deontological theories is that they cannot justify their rules outside of their own system. Deontological systems consist of internal principles, the validity of which is not susceptible to proofs external to the logic of the deontological systems themselves. Just how we know where these deontological principles come from Frase doesn't say. That is the nature of deontological principles; they are "given."

Another epistemic lacuna in retributivism is that, even were we to accept the proposition that we have a common idea of right and wrong, and the criminal law for the most part embodies those values, we do not know what

form punishment should take. We know *why* the state should punish crimes, we just do not know in what way, to what extent, it should do so. In short, other than proposing reasons for punishment, retributivism knows nothing else about punishment.

One route for retributivism to prove its epistemic bona fides would be to take a positive law turn. This would be an uncharacteristic decision for retributivism, but it has the advantage of providing an identifiable epistemic source for both crimes and their punishments. This approach would substitute the state-as-lawgiver as the ultimate source of knowledge for crimes, in place of common moral norms. Desert and blameworthiness would derive from the sheer fact of legal violations rather than from transgressions of fundamental moral norms that have been codified in the law.

The limited retributivism that Frase favors does not address the essential difficulties of retributivism. Indeed, limited retributivism introduces additional problems. Limited retributivism moderates the bounds of punishment through consideration of other factors, such as deterrence (if this is what Frase means by "crime control") and the "permissible" degrees of severity or leniency.

The problem with limiting retributivism is that a deontological system cannot logically limit itself by principles that lie outside itself. A moral code that designates a particular punishment for murder can reasonably allow for mitigating considerations, such as duress or self-defense. That code cannot, however, logically permit the prescribed punishment to be reduced for reasons inconsistent with, or foreign to, its principles.

The point is not that we are unable to acquire knowledge from different sources or that we cannot coherently assimilate different systems of normative rules. Rather, we cannot rationally assert either epistemological or moral propositions that are contradictory or that are derived from incompatible postulates. If the deontological system of principles underlying retributivism directs that crimes be punished, yet does not say how, then the retributivist is right to look for guidance elsewhere. The problem is that the solution offered by limited retributivism does not supplement the deontological knowledge but contradicts it. One may not advocate a lesser punishment for a crime for which the "known" degree of blameworthiness justifies a more severe punishment.[19]

19. This might seem reminiscent of the classic relationship between justice and mercy: mercy moderates justice without denying it. However, in such instances, the argument for

In short, there is only "retributivism;" there is no "limited" or qualified retributivism. Limited retributivism is an illusion, an untenable hybrid, because it incorporates considerations that are not only external to, but are inconsistent with, the root reason for retributivism as the justification for punishment.

Following Frase's argument, an advocate of retributivism somehow knows from the deontological corpus, what acts are—or should be—crimes, and that crimes (blameworthy acts) must be punished. Strangely, though, one does not know how each crime is to be punished. A theory of punishment that draws its proof from within, as in retributivism's reliance on a deontological system, justifies punishment on the grounds of a *moral knowledge* of what should be done with the convicted criminal. Punishment, like desert, is preexistent, set by the original deontological code. Morality does not, on its own, indicate how immoral acts are to be handled.

To identify the right penalty for a particular crime, retributivism typically relies on "proportionality." This is the closest that retributivism comes to addressing the nature of actual penalization. Yet proportionality, as Douglas Husak observes, does not tell us what forms punishment should take. It only guides how severely a particular crime should be punished relative to a different crime.[20] Frase explains that "the severity of [criminals'] punishment should be proportional to their degree of blameworthiness. The two elements most often cited as determining an offender's degree of blameworthiness are the nature and seriousness of the harm caused or threatened by the crime and the offender's culpability in committing it."[21] Proportionality is said to preserve the principle of equity in punishment based on desert: like crimes entail like punishments.[22]

---

mercy is not counterposing a different value to justice. Rather, it is posing additional considerations that are consistent with the system's definition of justice. Mercy is justice refined, not contradicted.

20. Douglas Husak, Overcriminalization: The Limits of the Criminal Law 14 (Oxford University Press, 2008).

21. Frase, Just Sentencing, *supra* note 15, at 8.

22. Michael Tonry, Sentencing Matters 13–20 (1996); Christopher Slobogin, *Defending Preventive Detention*, *in* Criminal Law Conversations 68–69 (Paul H. Robinson, Stephen P. Garvey, & Kimberly Kessler Ferzan eds., 2009); Frase, Just Sentencing, *supra* note 15, at 58–60; Douglas Husak, *Transferred Intent*, *in* Philosophy of Criminal Law, *supra* note 18, at 112.

Proportionality considers the degree of the perpetrator's desert to ensure that equally deserving criminals end up with similar sentences.

Proportionate sentences are supposed to take into account the type of crime, the specific events of its commission, the degree of cruelty with which it was carried out, and the extent of harm it produced. The assumptions underlying proportionality are first, that crimes can be ranked by their intrinsic offensiveness and disruptiveness, and second, that there are corresponding punishments that can, somehow, be determined.[23] This is why we can distinguish between misdemeanors and felonies; the former typically produce less damage than the latter, in terms of both financial cost and personal harm, and they are motivated by less malevolent desires.[24] Likewise, there are grades of punishment among felonies. Premeditated murder for personal monetary gain is widely understood as a more detestable crime than involuntary manslaughter, while both are deemed more heinous than theft of an unoccupied automobile.[25]

Retributivism's reliance on proportionality is a misstep.[26] If we cannot *know* exactly *how* people should be punished, and to what degree, it is difficult to justify the practice of punishment.[27] Punishment, after all,

23. Proportionality has found a secure place in American punishment jurisprudence. The Supreme Court, for instance, views proportionality as basic to the logic of sentencing. *See Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455 (2012). The concept of proportionality has served to restrain tendencies toward harsh, vituperative sentences. *See* Alex R. Piquero, *Youth Matters: The Meaning of Miller for Theory, Research, and Policy Regarding Developmental/Life-Course Criminology*, 39 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 347 (2013).

24. Proportionality could be said to derive from the inherent rank of different "legal norms," as they pertain to the moral offensiveness of the crime to be punished. *See* MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 39 (2007).

25. As just one indication of the different weight given to these crimes, the federal sentencing guidelines attach a Base Offense Level of 43 to First Degree Murder, whereas they start Involuntary Manslaughter at, at most, a lower level of 22. These numbers correspond to periods of incarceration. U.S.S.C. GUIDELINES MANUAL, Part A, Offenses Against the Person, 1. Homicide, §§ 2A1.1 and 2A1.4.

26. A brief but informative recent survey of the role of proportionality in modern theories of punishment is available in Richard S. Frase, *Excessive Relative to What? Defining Constitutional Proportionality Principles*, *in* WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT 263 (Michael Tonry ed., 2011).

27. Robert Ferguson outlines the problem succinctly: "Proportionality and the added notion of similar treatment for similar crimes are relational concepts. . . . The logic is impeccable, but missing from it is the basis, the source that might tell us what the ideal sentence should be. . . . Any sentence of length by itself is an arbitrary measure. Its integrity

entails treating a person in a manner that is counter to the moral principles of the deontological system. That poses a problem because our reservations about the fairness of punishment arise from the same moral perceptions we have about crimes. One retributivist could insist that the death penalty is the correct, proportionate sentence for certain especially heinous and destructive of crimes (serial murder, rape, defamation of God's name—the crimes will vary by culture). Another could oppose capital sentences on the grounds that they are excessively cruel. Neither can prove his respective position, short of pointing to a consequence explicitly dictated by the deontological doctrine.[28] The moral views driving the discrepant conclusions about the rightness of execution derive either from conflicting interpretations of the shared moral code, or from reliance by at least one of the disputants on moral beliefs drawn from a different source.

Retributivism can be unforgiving for it does not require that punishment try to reintegrate the criminal into society. Where the only limit is what is "deserved," the latitude to punish remains open and arbitrary. Even in its "limited" version, retributivism treats the criminal as an object. Retributivism does not concern itself with a criminal's remorse, or with the effect of punishment on the subject's life after the sentence is completed. These are considerations extraneous to the blameworthiness of the criminal act itself.[29] In the end, retributivism harbors a vestige of *lex talionis*, the notion that the criminal should suffer as he caused others to suffer. Yet this principle has long been discarded, at least explicitly, as a rational rule for punishment.[30]

---

exists as a variable fixed by legislative debate, determination, and statutory construction." ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT 14 (2014).

28. HART, *Punishment and the Elimination of Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY, *supra* note 1, at 161–62.

29. Michael Tonry, *Can Twenty-first Century Punishment Policies Be Justified in Principle?*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 21 (Michael Tonry ed., 2011).

30. MOSES MAIMONIDES, THE GUIDE OF THE PERPLEXED, Vol. 2, Bk. 3, Ch. 41 (Shlomo Pines trans., 1963); Ari Kahn, *Mishpatim (Exodus 21–24), "Lex Talionis": Law and Ethics*, M'ORAY HA'AISH (Feb. 14, 2009), http://www.aish.com/tp/i/moha/48961051.html; Michael Fishbane, *Law, Story, and Interpretation*, *in* THE JEWISH POLITICAL TRADITION: AUTHORITY, Vol. 1, xxxix–l-li)Michael Walzer, Menachem Lorberbaum, & Noah J. Zohar eds., 2000).

B. Consequentialism

Consequentialist theories take an instrumental view of punishment. They do not depend as strongly as retributivism on notions of desert or on deontological commands to condemn reprehensible acts. Rather, they justify criminal punishment according to its effectiveness in discouraging future crimes. Although consequentialist theorists, too, view crimes as negative behavior to be shunned and prevented, consequentialism is less overtly moralistic than retributivism; it is more as though one calls in an expert technician for practical advice on how to suppress certain undesirable incidents. In contrast to retributivism, consequentialism is a "forward-looking" theory.[31] Consequentialist theories of punishment are, or at least initially appear to be, more attentive to epistemological justifications than retributivism. They defend punishment by pointing to its supposedly empirically determinable results. For consequentialism, trends in crime provide evidence of the general effectiveness of a given punishment. Yet, for all their seeming acceptance of the centrality of epistemic standards, consequentialist theories have equally deep-seated epistemological flaws.

Interpreted liberally, "consequentialism" encompasses a range of philosophies of punishment, from deterrence to "reparative" theories. Deterrence uses aversive methods of criminal penalization to teach the individual perpetrator ("specific deterrence") and the public at large ("general deterrence") to eschew criminal acts. Reparative theories (with the exception of rehabilitation), in contrast, are focused less on extinguishing (although they hope to discourage) future criminal behavior. But they are consequentialist in two fundamental respects. First, they look to what can be done to fix the wrong committed. Second, they hold that the perpetrator of a crime can change. Those who advocate restitution (albeit weakly) and restorative justice (more earnestly) expect that the criminal will come to understand that he wronged his victims and that he will show repentance for those wrongs and rectify them insofar as he can. Restitution rests with the provision of material compensation, whereas restorative justice is a more extensive process requiring the criminal to reencounter his victims in a state of remorse. Restorative justice calls for victims, too, to experience some change: they should put aside their anger and fear toward the culprit, if not their distress over the offense, and are encouraged to try to accept the criminal's sincere contrition.

31. Hart, *supra* note 28, at 160.

1. Deterrence

Punishment serves as a "general deterrent" when it effectively cautions the general population about the legal penalties of breaking the law. "Specific deterrence" refers to the dissuasive effect of punishment on the particular criminal being punished.[32] The proof of the effectiveness of deterrence is the decrease or absence of crime. Deterrence holds punishment to an evidentiary standard of demonstrable efficacy.

In theory, if a punishment is not an effective deterrent, then its failure becomes evident when a crime occurs that otherwise would not have. But the effect of deterrence, whether general or specific, is difficult, if not impossible, to prove.[33] These outcomes cannot be demonstrated with certainty. Deterrence is necessarily speculative and probable, not predictive.[34] We cannot know with certainty that a crime would have occurred "but for" a particular type of sentence, let alone whether the imposition of a sentence in any individual instance discouraged a later crime.

Statistical studies may show a correlation between the institution of a criminal penalty and a subsequent (often interpreted as a *consequent*) decline in crime, or people may report in interviews that they might have been tempted to commit a crime but for the prospect of punishment. Additionally, experiments can try to track how people modify their planned behavior depending on the prospect of adverse consequences following certain acts. For instance, if relatively mild punishments are replaced with far harsher sentences for selected crimes, and a decrease in the incidence of that crime follows close upon the change, a deterrent effect might be plausibly attributed to the revised penalties.

Effective deterrence is reliant on a consistent practice of law enforcement and adjudication before and after the adjustment in sentencing. It also presupposes that no other pertinent social changes have happened in the interim that might have affected the willingness of people to commit a crime. Furthermore, it assumes that the community at large knows about

32. George Fletcher formulates the distinction between these two categories of deterrence succinctly in THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL: FOUNDATIONS, Vol. 1, 247–48 (2007).

33. Michael Tonry, *Learning from the Limitations of Deterrence Research*, *in* 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 279 (Michael Tonry & Norval Morris eds., 2008).

34. Deryck Beyleveld, *Identifying, Explaining and Predicting Deterrence*, 19 BRIT. J. CRIMINOLOGY 205 (1979).

how people are sentenced, what sentences are served, and for what crimes.[35]

If the only aim of punishment is deterrence, then there is no limit to what sentences are legally permissible. Where incarceration might be dissuasive for many people, the prospect of execution is surely even more so. Deterrence hedges its bets on the hunch that, at some point, penalties become so severe that (assuming police work is efficient and sentences are carried out and publicized) they surely discourage the targeted crimes. This presumption, if not entirely testable, is plausible. On the other hand, there is also reason to think that harsher penalties do not deter so much as anger precisely those communities most harmed by crime.[36] However, advocates of deterrence cannot claim that they can know with any precision just how punishments should be designed and how their effect can be measured.[37]

Deterrence can work if sentencing is perceived to be arbitrary or biased. The deterrent effect of a hard punishment for any crime has less to do with fairness than the likelihood that those who commit the crime will be caught, convicted, and sentenced to the punishment. It is not important whether the punishment was deserved but rather whether people will attribute it to the commission of the crime. The possibility of a capital sentence is unimpressive if people believe the state will apply it for certain crimes regardless of whether the state has satisfactorily proven the defendant committed the crime. The knowledge that matters for advocates of deterrence theory is whether punishment effects behavioral changes, both

35. Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEORGIA L.J., 949, 954 (2002–03).

36. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VIRGINIA L. REV. 349, 393 (1997).

37. Britain's Black Act, passed into law in May 1723 and repeatedly enhanced and reenacted, was notorious for the large list of crimes that were designated capital felonies. E.P. Thompson observed, "Although a tendency to attach the death penalty to new descriptions of offence can be noted in previous decades, the Black Act of 1723 . . . signalled the onset of the flood-tide of eighteenth-century retributive justice." WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 23 (1975). Although Thompson characterizes the success of the law as arising from a growing inclination toward harsh retributive punishment, he also finds that the drastic punishments did not show themselves to be profoundly deterrent. *See* WHIGS AND HUNTERS 228–36, and essays in the companion anthology, ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1975): Douglas Hay, *Poaching and the Game Laws on Cannock Chase*, 189, 193; and E.P. Thompson, *The Crime of Anonymity*, 255ff.

in the individual and in society at large. Knowledge of guilt, of desert and blameworthiness, is less relevant.[38]

Another difficulty with deterrence is that the goal of dissuasive efficacy prevails over the actuality of a crime. If the justification for deterrence is to discourage future crimes, then punishment is more important than proof of guilt. The state can justify show trials and the punishment of innocent people to impress on the public the dangers of committing crimes. Both specific and general deterrence can be just as effective regardless of whether the actual perpetrator or some other person is punished and even whether or not the crime has occurred. Specific deterrence could justify "punishment" anticipatorily, for example, by preemptively subjecting a person to punitive treatment to warn him off doing a crime. But this would no longer be punishment, which is understood as the state's *response* to an actual crime. The same gap between guilt and punishment can arise with general deterrence. The state need not find and penalize people who are in truth guilty of a crime; it could just as well publicize the punishment meted out to random people, or subjects chosen for other reasons, to broadcast the dangers of pursuing a chosen crime. Deterrence is a blunt, imprecise tool.[39] Thus the lack of a desert connection in deterrence, problematic as it, opens the way to an instrumentalist punishment that is divorced from real guilt or crimes.

Following its internal logic to its conclusion, deterrence does not require the occurrence of an actual crime. It therefore does not depend on knowledge that a crime took place or on identifying the perpetrator of a crime. To discourage future crimes, all that is necessary for general deterrence is that people are made to believe that a crime happened and that the culprits behind it were caught and punished in the manner publicized. It highlights the disjunction between deterrence theory and punishment for an actual act by the responsible actor. That is the epistemic weakness in deterrence: because the purpose of consequentialism is pedagogical, it is not bound to

38. Kant's famous proscription in *The Metaphysics of Morals* against using people as means is consistent with the equal distribution of individual rights. A serious risk of arguments for deterrence is that they can justify severe criminal penalties out of a naïve utilitarian concern with a greater social benefit, disregarding the rights of the subject of the penalties. *See* C.S. Nino, *A Consensual Theory of Punishment*, *in* PUNISHMENT: A PHILOSOPHY & PUBLIC AFFAIRS READER 94, 96–97 (A. John Simmons, Marshall Cohen, Joshua Cohen, & Charles R. Beitz eds., 1995).

39. PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 82–83 (1997).

the truth of real events. The lessons may be thought more important than the welfare of the students.[40]

Finally, deterrence is afflicted with a peculiar paradox. For deterrence, punishment is prompted by, yet not directed to the crime being punished. Punishing the accomplished crime is pointless because the crime is over and done. The goal of punishment is rather to broadcast the message that *this sort of crime* will be punished in this way should anyone, whether the subject or anyone else, do it in the future. And so it goes on, ad infinitum: Every crime that is punished is therefore punished, not for itself (as noted above, for deterrence, there may never really have been a crime), but to discourage similar crimes until that unrealizable day when The Crime finally meets its punishment.

To rein in deterrence, theorists who incline toward utilitarianism have followed Bentham's principle of parsimony, according to which punishments should not exceed the duration and severity necessary to accomplish their intended effect. Punishment should be constrained by a combination of efficacy and utility—the prisoner should suffer no more than is necessary to accomplish the purpose of punishment.[41]

There are commonalities between deterrence and retributivism. For one, they can both find value in proportionality. For deterrence, treating every crime as equally condemnable would result in either mild responses to execrable crimes, or very forbidding punishments for minor crimes.[42] For instance, responding to crimes of passion or crimes committed under the influence of drugs or alcohol—where the *mens rea* is less vicious or conscious—with punishments designed solely to deter could be of little purpose and disproportionate cost. For deterrence then, proportionality provides a regulative theme that would meet more offensive or heinous crimes with tougher sentences, the more to discourage the crimes.[43]

---

40. George P. Fletcher, Basic Concepts of Criminal Law 31 (1998).

41. Richard L. Lippke, Rethinking Imprisonment 13 (2007).

42. The ideas of proportionality and deterrence are not inextricably aligned, however. A society intent on discouraging all forms of crime may apply the harshest of penalties to every crime. Proportionality as a means to rate crimes and to formulate suitable punishments is irrelevant if the goal is only to deter crime.

43. Research continues to raise doubts about the predictable effectiveness of deterrence, even in its most severe forms, such as the death penalty. These studies note that the "experiment" is necessarily distorted by other factors, such as perceptions of bias in the justice system, or the uneven enforcement. See recent studies by the National Research

A second commonality between the two theories is desert. As we noted above, for the advocate of deterrence theory, efficacy is the standard for justifying punishment. Tying punishment to a perpetrator's culpability is less important. A society might just as well punish a criminal by incarcerating his mother as the criminal himself. Knowing that one's mother will go to prison for one's own crimes could be just as effective a deterrent, both specifically and generally, as carrying out the punishment on the criminally directly.

Supporters of deterrence might respond that they share the belief in desert more commonly ascribed to retributivists. Yet desert does not eliminate the argument for vicarious punishment. If the point of punishment is to cause some discomfort to the deserving perpetrator, that harm can still be accomplished by making him suffer through the experience of another's pain. Mom can still take the brunt of the penalty under desert theory (assuming the criminal is fond of his mother; other relatives or friends can be substituted as necessary). As it is, the suffering produced by punishment is normally experienced by people other than the criminal. Criminal penalties nearly always cause collateral distress.

2. Utilitarianism

Jeremy Bentham repudiated retribution as fundamentally irrational.[44] He considered retributive punishment to be nothing more than society's irrational manifestation of its resentment against the criminal and his deeds. By the time a court found the defendant guilty and proclaimed his sentence, Bentham argued, the criminal's motivations had become irrelevant; indeed, his motivations were already beyond redress at the time he committed his crime.

For Bentham, criminal punishment was defensible to the extent that it produced a positive social result by deflecting people from future crimes.[45] Consequently, utilitarian arguments for punishment are not based on

Council of the National Academies, such as *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134ff (2014) and *Deterrence and the Death Penalty* (2012).

44. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* WHY PUNISH? HOW MUCH? A READER ON PUNISHMENT 170 (Michael Tonry ed., Oxford University Press 2011) (1823/1780). See also Michael Tonry's discussion of Bentham's argument in *Introduction: Thinking About Punishment*, *id*. at 12–13.

45. Bentham laid out "Rules" under which punishment, which "itself is evil," can be justified to prevent a greater "mischief." Bentham, *id*. at 63–67.

reason alone. They have a strong moral impetus.[46] Punishment should not be driven by revenge, for that is merely pointless and cruel. Rather, punishment should be corrective.

But utilitarianism cannot define the "correct" punishments for particular crimes. The problem lies at the core of utilitarianism; utilitarianism cannot evaluate competing, equally favored values. Utilitarianism is unable to assert which values should be maximized other than by comparing the relative utilities they *support*. Although we may all agree that society would be better off with less crime, we cannot resort to utilitarianism to determine just how far society may go to suppress crime. A beneficent oligarch who is corrupt but who graces his native city with public amenities may be producing more utility than would result from steps taken to prevent him from engaging in corruption—that is, his crimes do less evident harm than good. His imprisonment, on the other hand, might lead to turf wars among his rivals, which would make the city more dangerous. The difficulty with a Benthamite scale of punishment is that it cannot provide a defensible *actual* measure. It is unable to define in detail what makes for a suitable or a "reasonable" punishment.[47]

Utilitarianism is also unable to say whether individual utility (call it "specific" utility) should be weighed against that of a larger social body ("general" utility). For instance, should the wishes of convicted criminals be factored in when calculating competing utilities in setting a sentence? If not, why not? But if so, then how? People convicted of murder might overwhelmingly prefer long sentences, even in desolate prisons, to execution. The majority of the population might favor capital punishment for murderers. Although convicted criminals may be comparatively few in number in relation to the rest of the population, they experience their sentences directly, unlike everyone else. Their specific utility is greatly

46. "For such an outlook [referring to the Utilitarian arguments of Leonard Trelawny Hobhouse], the moral justification for punishment lies in its effects—it its contribution to the prevention of crime and the social readjustment of the criminal. It is essentially forward-looking: it considers the future good we can do to society including the criminal. In the pursuit of these forward-looking aims, we need all the resources of reason, experience and science; we cannot here be guided by our intuitions; we cannot know by looking only at what the criminal has done, what should be done to him. His act, lying in the past, is important merely as a symptom. . . . " HART, PUNISHMENT AND RESPONSIBILITY, *supra* note 1, at 159–60.

47. Richard Dagger, *Republicanism and the Foundations of Criminal Law*, *in* DUFF AND GREEN, PHILOSOPHICAL FOUNDATIONS, *supra* note 3, at 11.

reduced by their punishment, whereas the satisfaction the public enjoys from knowing that the state executes criminals might be, per capita, milder (and how does one multiply individual utilities?). What is the rational formula for calculating the relative value of one person's intense, immediate experience of changes in his utility against the more vague experience of the general population? Utilitarianism cannot provide this formula.

To what extent may the fate of sentenced criminals be decided by the utility of the rest of the population? What are the brakes on what can be done as punishment, if the solution to the calculation is solely what best protects or, at least, satisfies the public? Utilitarianism cannot answer moral questions regarding the treatment of convicts. It is not, in itself, a source for knowledge about the reason for punishment or how it should be practiced. Utilitarianism is just a device for relative measurement.

C. Reparative Theories

Several theories of criminal punishment reject the focus on punitive treatment in favor of repair. The object of the repair may be to encourage the criminal's accommodation to social norms, to move him to acknowledge and possibly recompense his victims, or to address the impulsive drives that led him to commit the crime. The theories share a basic expectation with deterrence, which is that punishment should effect change in the criminal and, perhaps, provide some solace to his victims. In addition, reparative theories and deterrence theory share the view that punishment ought to have empirically identifiable effects.

Like deterrence, reparative theories of punishment can be plotted along a scale from specific to general effect. At one end, rehabilitation concentrates on the individual perpetrator's character and behavior (although it may also try to address social environmental influences on the subject). Restitution and restorative justice are more general in their intent. They look more toward the effects of the crime on its victims. Truth commissions, for instance, publicize the defendants' regret and acknowledgement of the wrongs they did.

1. Restitution and Remediation

Restitution and remediation are the most modest forms of reparative theories. They are often partial penalties.[48] That is, they are done in conjunction

48. Lippke, Rethinking Imprisonment, *supra* note 41, at 46–47.

with more conventional punishment restricting the subject's freedom, such as incarceration or probation. Restitution and remediation entail compensating victims as part of the criminal's penalty.[49] Criminal restitution is more than compensation; it includes a punitive element, whether it be shaming or fines or some traditional penalty like incarceration.[50]

Restitution in particular is often combined with other penalties. It is not always practicable. A convicted criminal may not be in a financial position to pay any significant compensation, or compensation may simply be inadequate to redress the damage caused.

Restitution and remediation also face the challenge of determining the right standard of measurement. Set too low (relative to the particular perpetrator), court-mandated criminal restitution can prove to be little more to a criminal than the "cost of doing business," and thereby fail to have any punitive or deterrent impact. Set too high, restitution may not be feasible, or it may be so punitive that compensation is beside the point.

2. Restorative Justice

Restorative justice has enjoyed widespread endorsement in the short time since it was first formally introduced in penal literature.[51] The idea of restorative justice has even led to the establishment of an eponymous journal dedicated solely to its study.[52] The aim of restorative justice goes much further than compensation to victims of crime. Restorative justice

49. Frederick G. Reamer, Criminal Lessons: Case Studies and Commentary on Crime and Justice 17 (2003).

50. R.A. Duff summarizes the distinction between compensation and restitution well: "English law distinguishes compensation sharply from punishment; and it is true that the idea of compensation is quite distinct from that of punishment. If I compensate my victim I am trying directly to repair, even if I cannot annul, the material harm which I caused him, whereas in undergoing punishment I am receiving the condemnation of my community and expressing my repentance to the community. But the same activity—making a financial payment, or providing some material assistance—could serve both purposes; one who causes criminal damage, for instance, could be required to repair the damage which she caused to another's property as a way both of compensating her victim and of undergoing punishment." R.A. Duff, Trials & Punishments 284 (1986).

51. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, *in* 25 Crime and Justice: A Review of Research 1 (Michael Tonry ed. 1999). *See also* Lode Walgrave, *Investigating the Potential of Restorative Justice Practice*, 36 Wash. U.J.L. & Pol'y 91 (2011).

52. *Restorative Justice* is published by Hart since 2013.

should help the criminal understand firsthand how the acts he indulged in caused pain and loss for his victims.[53] Restorative justice may follow criminal trials as part of a sentence, but it may also be used in place of formal court processes. In those instances, guilt is not proven through a contest, such as an adversarial trial, but rather through the perpetrator's acknowledgement of his deeds and his desire to reconcile with or at least confess to his victims.[54]

Restorative justice rests on two epistemic foundations. One is that the admission and remorse of the perpetrator must match the experiences recalled by his victims. Reconciliation is obviated when the versions of events diverge too greatly: victims will view the perpetrator as deluded or defensive, and the perpetrator (if he is sincere is his recollections) will perceive his apologies as being received in bad faith. The second is the victims' belief in the sincerity of the perpetrator's remorse. For reconciliation to take root, the victims need to trust that the perpetrator's regret is genuine. Victims cannot prove the fidelity of a perpetrator's apology; they must nevertheless come to believe that they can judge it correctly. (Even then, they may decide to reject it as an inadequate resolution.) In short, the first epistemic foundation is that the victims and the actor recall corresponding facts about the event similarly. The second is the resonant quality of the perpetrator's sorrow; that is, that its tone rings true to the victims.

The possibility of satisfying these two epistemic aspects undergirds the rationale for restorative justice. A shared recognition of the truth of what occurred, coupled with the criminal's regret, will achieve true reconciliation in two respects. First, the victims' hurt is redressed by the direct apology of the perpetrator. For the victims to have the opportunity to observe the criminal's remorse and to hear his admission of his deeds supposedly helps them heal more deeply than experiencing the exercise of vicarious revenge by the state-ordered punishment. Second, the perpetrator, too, changes by realizing and regretting the wrongs he committed.[55]

53. Lode Walgrave, *Restoration in Youth Justice*, *in* TONRY, WHY PUNISH?, *supra* note 44, at 319; HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (2005).

54. Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*," UTAH L. REV. 167 (2003); ZEHR, *supra* note 54, at 158–214.

55. Braithwaite, *Restorative Justice*, *supra* note 51, at 20–38.

Restorative justice programs and "victim-offender mediation" efforts have been subjected to numerous empirical and analytical studies in the United States and elsewhere.[56] Examinations of ultimate outcomes, in the form both of victim satisfaction and of reform and recidivism rates of perpetrators, have revealed some real success.[57] Restorative justice can be measured through the overt subjective expressions of the perpetrators and the victims—remorse and acceptance, respectively.

Restorative justice does not entirely escape the tendrils of uncertainty. First, it may simply not be effective with all criminals or applicable to every type of crime. Second, critics have questioned whether restorative justice accomplishes all that a society expects of criminal punishment.[58] The response to bad acts may, for social catharsis, require something more punitive than the rituals of restoration. Moreover, restorative justice may at times achieve false positives or ephemeral results. Perpetrators may be insincere in their announced remorse, or they may not truly understand the repercussions of what they did.[59]

3. Rehabilitation

Rehabilitation promotes resocializing the criminal by addressing the psychological problems that are thought to have led him to his crime.[60] The term "psychological" is used here advisedly. Ideally, rehabilitation should

56. *Id.* at 38–70; Jennifer J. Llewellyn, Bruce P. Archibald, Donald Clairmont, & Diane Crocker, *Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation*, 36 DALHOUSIE L.J. 281 (2013).

57. Mark S. Umbreit, Betty Vos, Robert B. Coates, & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251 (2005). Mark Umbreit has recounted the results of a number of such studies over the years. *See, too*, Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*," 2003 UTAH L. REV. 167 (2002).

58. *See* David Dolinko, *Restorative Justice and the Justification of Punishment*, UTAH L. REV. 319, 339 (2003), for trenchant challenges to restorative justice.

59. In recounting his experiences as a member of the United Nations Truth Commission for El Salvador, Thomas Buergenthal recalled that soldiers responsible for killing civilians en masse frequently responded that they had simply made "a mistake." No remorse was forthcoming. THOMAS BUERGENTHAL, A LUCKY CHILD: A MEMOIR OF SURVIVING AUSCHWITZ AS A YOUNG BOY 215–16 (2009).

60. HENRY RUTH & KEVIN R.REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 50 (2003); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH? 69 (2008).

include efforts to ameliorate the social circumstances, such as deleterious family relations or child abuse, poverty and unemployment, inadequate education, or a local culture that encourages certain crimes. In practice, though, rehabilitation is typically more restrained in its aims. It concentrates on the criminal's internal troubles as the source for his social maladjustment.[61] The criminal's personal history comes to the fore in the diagnosis and treatment of his antisocial proclivities. Rehabilitative programs for convicted criminals often include drug or alcohol treatment along with psychotherapy.[62] Rehabilitation programs work best away from prisons.[63]

The theory of criminal rehabilitation emphasizes personal reform over punishment. The particular crime a person committed is relevant inasmuch as it illuminates the criminal's inner struggles.[64] Proportionality is not relevant. Rehabilitation is forward-looking, for it seeks to reduce the likelihood of recidivism by helping the individual fit back into society.[65]

Just how effective rehabilitative methods are (keeping in mind that there is a plethora of different types and approaches for such programs) remains disputed, even among their proponents.[66] Not every criminal is open to rehabilitation as it is currently carried out; some may never be. Furthermore, not everyone who completes a rehabilitative course will be equally capable of sustaining their reformed condition. The durability of rehabilitation, like preventive programs and anti-delinquency efforts, is largely

61. The aims and history of rehabilitation is laid out in detail in FRANCES T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION (2d ed. 2013).

62. ROBINSON, *supra* note 60, at 100–07.

63. LIPPKE, *supra* note 41, at 76–77.

64. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313 (2013).

65. In contrast to its usefulness for retribution and deterrence, proportionality is irrelevant for rehabilitation theory. Rehabilitative criminal sentences continue so long as necessary to reform in the criminal. "Remediation," too, does not rely so much on proportionality as on a putative calculation of comparable value. A first concern for remediation is to calculate the material value of the damage and suffering exacted by a crime. This value is used to determine the restitution the criminal owes to his or her victim. As with remedies for tortious acts, calculating a monetary value for a personal harm, as opposed to the sheer loss of property, is inevitably vague.

66. See RUTH & REITZ, *supra* note 60, at 111–14; ROBINSON, *supra* note 60, at 99–107; Andrew von Hirsch & Lisa Maher, *Should Penal Rehabilitationism be Revived?*, *in* PRINCIPLED SENTENCING 41 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

influenced by the social situation to which the participant returns.[67] Rehabilitation programs may be underfunded, leaving candidates without a complete regimen of programs. Juveniles appear to be more amenable to rehabilitation than adults—although programs used for youth can also been quite different in form and setting from those for older defendants.[68]

Rehabilitation has had an inconsistent presence in the history of American criminal penal practices. In *Tapia v. United States*, the Supreme Court has recognized that imprisonment can be adverse to the achievement of rehabilitation. The Sentencing Reform Act of 1984 (SRA) stipulates that judges should consider the four (often conflicting) purposes to punishment when determining the proper sentence for each defendant.[69] Under 18 U.S.C. § 3582(a), judges are not at liberty to lengthen a term of imprisonment "in order to foster a defendant's rehabilitation" regardless of the quality of facilities available in the particular prison. The Court found the meaning of that provision in the SRA clear: "Under standard rules of grammar, § 3582(a) says: A sentencing judge shall recognize that imprisonment is not appropriate to promote rehabilitation when the court considers the applicable factors of § 3553(a)(2); and a court considers these factors when determining *both* whether to imprison an offender *and* what length of term to give him. The use of the word 'imprisonment' in the 'recognizing' clause does not destroy—but instead fits neatly into—this construction."[70] The decision makes the point repeatedly that prison is not conducive to rehabilitation. This is not an indictment of the efficacy of rehabilitation, but rather a call to trial courts

67. This is practically a truism, yet the observation is found over and over again in the research. *See inter alia*, EDWARD J. LATESSA, SHELLEY J. LISTWAN, & DEBORAH KOETZLE, WHAT WORKS (AND DOESN'T) IN REDUCING RECIDIVISM 212–13 (2014); David P. Farrington & Brandon C. Welsh, *A Half Century of Randomized Experiments on Crime and Justice*, *in* 34 CRIME AND JUSTICE: A REVIEW OF RESEARCH 55 (2006); Janne Kivivuori & Jon Gunnar Bernburg, *Delinquency Research in the Nordic Countries*, *in Crime and Justice in Scandinavia*, 40 CRIME AND JUSTICE: A REVIEW OF RESEARCH 405 (Michael Tonry & Tapio Lappi-Seppälä eds., 2011).

68. Gerald G. Gaes, Timothy J. Flanagan, Laurence L. Motuk, & Lynn Stewart, *Adult Correctional Treatment*, *in Prisons*, 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 361, 414 (Michael Tonry & Joan Petersilia eds., 1999).

69. "These four considerations—retribution, deterrence, incapacitation, and rehabilitation—are the four purposes of sentencing generally, and a court must fashion a sentence 'to achieve the[se] purposes . . . to the extent that they are applicable' in a given case. § 3551(a)." *Tapia v. United States*, 131 S.Ct. 2382 (2011), at 2387.

70. *Tapia*, *id.* at 2389.

to realize that they cannot use the traditional tools of punishment—that is, imprisonment—if they are serious about rehabilitation.[71]

The main epistemic challenge for rehabilitation is, as suggested above, that its success is difficult to predict. How the efficacy of rehabilitation should be measured is unclear. What qualifies as proof that a criminal is adequately rehabilitated? Is it that he avoids committing *any* further crimes, or only those related to the sorts of violations he did before? If the criminal is released into challenging circumstances (where there are no support services or accessible jobs) and he eventually commits another crime, does this indicate that he was not effectively rehabilitated or that his rehabilitation was not adequate to his social situation?[72]

Rehabilitation can be undertaken in conjunction with a restorative program. The focus of rehabilitation, though, is (like specific deterrence) to try to minimize the likelihood of recidivism and to get the criminal back into society in a more conforming state of mind.[73]

---

71. *See* Ville Hinkkanen & Tapio Lappi-Seppala, *Sentencing Theory, Policy, and Research in the Nordic Countries*, *in* Tonry & Lappi-Seppälä, *supra* note 67, at 349, 373.

72. A common criticism of rehabilitation is that it is not equitable for victims or for criminals. The argument maintains that rehabilitating an individual criminal ignores the essential wrongfulness of the crime. The person who committed a terrible, malicious rape is subjected to treatment in the same way as the habitual petty thief. Neither undergoes a punitive experience indicating social rejection of their crimes. Moreover, one person may receive extensive attention from a team of psychological experts over a period of years, while another person, who may be guilty of a more disturbing crime, finishes his rehabilitation with a few sessions of anger management. This attack is misguided. Fairness is as central to rehabilitation as it is to more punitive theories of criminal punishment, but for rehabilitation, what is "fair" is defined by what is appropriate and effective for the individual subject. The theory does not discount the reprehensibility of the person's crime. Rehabilitation is still a punishment, for it restrains the subject's freedom and is a consequence of a criminal conviction. Victims may get little immediate gain from a criminal's rehabilitation, but that is no less true for more conventional criminal penalties. See ROBINSON, *supra* note 60, at 226.

73. Among some of the criticisms of rehabilitation is that, by dispensing with criminal penalization, rehabilitation produces only a weak specific deterrent quality. James Q. Wilson, an earnest critic of rehabilitation, epitomized this view in THINKING ABOUT CRIME (Basic Books, rev. ed. 2013 (1975)). The argument attacks rehabilitation for lacking a general deterrent effect because the prospect of a treatment program is not likely to give anyone pause who is contemplating a crime. The proponent of rehabilitation can reply that rehabilitation need not be deterrent if it produces the same end of directing a person away from crime. Furthermore, it is a strenuous and protracted experience for many. Potential criminals are not likely to commit crimes because they hope for a stint in a rehabilitative program.

Rehabilitation has a concept of determinable results, and measurement and rehabilitative programs evaluate their subjects to try to track the effectiveness of their efforts.[74] They use psychological diagnostic tools and rely on empirical studies to track which therapies work, and which do not, for which problems. Rehabilitation has a means (whatever its reliability) for determining the right amount of treatment. Ideally, the sentence concludes when the criminal has satisfied verifiable milestones. Unlike deterrence, rehabilitation does not draw its justification solely from its efficacy for reducing crime. It has the additional aim of repairing—not just dissuading—the criminal himself. Like the other reparative theories, the purpose of rehabilitation does not stop with the suppression of crime, but encompasses the amelioration of both the perpetrator's and the victim's lives post-crime.[75]

Rehabilitation offers the best extant model of a punitive approach that is not merely vengeful or potentially exploitative of the subject criminal. It has a notion of demonstrable efficacy. In addition, while it remains punitive as a limitation on the freedom of the subject, rehabilitation is aimed away from the paradox of legally inflicting conditions that are contradictory to society's moral beliefs.

However, rehabilitation is also an uncertain process. For some, the existent state of the art of rehabilitative methods may be ineffective. Even where it may appear to have worked, rehabilitation, as with any human behavioral reformative effort, is fallible and uncertain. A convicted criminal who appears at one time sincerely to have turned his back on crime may well fall back into it, whether because of duress, opportunity, or simply the fading of earlier intentions. Others may cleverly dissimulate their reformed states, intending always to find their way back to criminal ventures.

---

74. Gerald G. Gaes, *Correctional Treatment*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 712 (Michael Tonry ed., 2000).

75. One of the most prevalent, and dubious, charges against rehabilitation is that it is intrusive and paternalistic. Rehabilitation has on occasion been portrayed in popular culture as a form of mind control, *a la A Clockwork Orange*, leading to the destruction of the individual's personality. The famous first volley in this debate was loosed by Herbert Morris in *Persons and Punishment*, 52 THE MONIST 480ff. (1968), and it remains a common criticism. *See* DUFF, *supra* note 50, at 269; von Hirsch & Maher, *supra* note 66. Yet what is more paternalistic than confining a person to a small cell, in a large institution, where his or her life is extensively regimented, possibly for years? Incarceration, or any aversive criminal penalty, is in and of itself controlling, demeaning, and "paternalistic."

II. PUNISHING FOR WHAT WE KNOW AND THE PRINCIPLE OF SUITABILITY

We should be humble in the face of the fundamental absence of knowledge about the practice of punishment. We must recognize that punishment lies beyond the purview of the law alone. Sentencing cannot be solely a judicial function. Sentencing guidelines as they are currently understood, for instance, are a misstep. However fine they may allow for mitigating considerations, they are oriented around incarceration. If judges are to retain the power to sentence criminals, then they must at the very least compose sentences in consultation with experts from other fields, from psychology to sociology. Sentencing guidelines would be more defensible were they restructured to be advisory tools for analyzing a criminal's individual rehabilitative needs. The resulting penalties would be less typically fines and incarceration, but rather mandatory programs aimed toward practicable social reintegration.

In sum, the soundest regulative ideal for punishment is the principle of suitability. "Suitability" means fitting the punishment to the criminal, not the crime. Suitability ties punishment to knowledge—inasmuch as it is available—in two crucial ways. First, it requires that the criminal justice system attend more consistently to a society's common moral values. Second, suitability relies on empirical evidence of specific effectiveness. Whereas deterrence is speculation dressed up as prediction, suitability calls for punishment to incorporate current empirical knowledge, psychological as well as sociological, both general (what is known from past experience) and specific (what is observed in the subject being punished).

In practice, the principle of suitability inclines toward rehabilitation and related reparative theories. However, suitability is a broader concept in that it acknowledges the stubborn constancy of that quotient of criminals who are not amenable to reform. For this population, the criminal justice system must establish other arrangements. Those who prove themselves to be irremediably recalcitrant, despite continued attempts at rehabilitation, may well be a potential constant threat to society. Yet conventional prison is not the solution for their treatment, either. For one, the modern prison does not (apart from the use of solitary confinement) remove criminals from society. Rather, it segregates them into a parallel social world that is heavily structured, reductive, brutalizing, and dangerous. Those criminals who prove to be incapable of decent participation in society at large ought

nevertheless to live in a humane, if separate and controlled, environment.[76] The epistemic source for this observation lies both in our common moral values and in the admission that we do *not know* of a reason for more punitive treatments. Punishment that is destructive or inhumane has no claim to being suitable, for its sole purpose is the fulfillment of a vengeful impulse and the engendering of fear. The effect of contemporary imprisonment is that criminals are set aside, far from public consciousness, with little chance for self-betterment, for some fairly random period. It would appear that all that many of us would know about contemporary practices of criminal punishment is that we would rather not know.

III. CRIMINAL PUNISHMENT AND THE LIMITS OF KNOWLEDGE

None of the theories of criminal punishment has solved the dilemma of criminal punishment: punishment entails treating those who are culpable of criminal violations in a manner that is otherwise morally, indeed criminally, improper.[77] The evidentiary knowledge that underlies the proof of

76. For instance, convicted criminals, whether they live in community residential programs or more conventional highly secured prisons, could be enrolled in cooperative businesses. Each member would have an interest in ensuring that the group venture thrives, both to meet the expectations of their fellow members and to protect their individual financial gains. To avoid the different cooperatives falling victim to a tendency toward antagonistic gangs, they could be set up to be complementary rather than competing, with different "comparative advantages" or specializations. They would learn first-hand various aspects of commerce. They could even sell products directly to the public, causing them to respond to the desires of customers and exposing them to the rigors of negotiation and competition. They would have a stake in the success of their shared business, with profits accruing to their respective accounts. The venture would not only provide them experience in different aspects of running a business, but would also provide a more direct awareness of the economic hazards of crime. In general, the type of work for which convicted criminals should be prepared should not be unskilled, but quite the opposite. They need to gain an interest in social relations, for their self-respect, but more, to have a stake in society. This is intended merely as a suggestion of the direction in which reconstructive criminal penalization could move. Note that it could be adapted for a high-security prison no less than for a community residential program. That is the main point, to show that even the parallel, provisional "societies" of criminal segregation can be designed with an eye toward coexistence.

77. This argument is somewhat different from Kant's emphasis on the "penal law [as] . . . a categorical imperative." IMMANUEL KANT, *The Right of Punishment and the Right of Pardon*, *in* THE METAPHYSICS OF MORALS 140–41 (Cambridge University Press, 1991

criminal guilt is different from the kind of knowledge necessary to justify the proper form and quantity of punishment.

The retributivist maintains that punishment should correspond to desert, but he does know how desert translates into a particular punishment. The defender of deterrence does not need to know what kind of punishment a criminal receives so long as it works; yet she does not know whether a penalty will deter a crime, either specifically or generally.

Moreover, even if we could show that a particular punishment produced the anticipated result, how do we know that efficacy may be the sole criterion justifying its use? Knowing that a punishment is likely to accomplish some effect is not the same as knowing that we should use it. It may be inconsistent with other beliefs we share as a society. The threshold language in the Eighth Amendment of the Constitution regarding "cruel and unusual" punishments does not provide a normative basis for determining what punishments *should* be used, particularly in light of the existence of constitutionally guaranteed individual rights.[78]

The reparative theories are less afflicted with epistemological deficiencies. This is in part because they do not need to justify adverse treatment of criminals (although they are nonetheless punishments), and in part because they determinedly look for evidence that specific efforts work for each subject. Although we do not *know* that efficacy justifies punishment, penal methods that apply evidence-based methods that are also not strictly deleterious to the subjects, are closer to an epistemic foundation and conflict less with other social values. Yet reparative theories also have limitations. Reparative approaches must concede that their standards of proof are tentative; whether they rely on the absence of recidivism over a defined period or credible expressions of remorse, they cannot know that they will produce permanent rectifications in their subjects. They also have to acknowledge that some criminals will not be amenable to reform; reparative methods are not universally effective.

Measurement, whether of the duration or the severity of a prescribed punishment, is not in itself knowledge. This is as true for retibutivism as it

(1797)). A person is both a means and an autonomous subject in one: punishment shores up a community's moral tenets by indicating to both the perpetrator and the public that the perpetrator's acts were wrong. Thus not anyone may be punished: only when a person has been proven to have committed a criminal offense, must that offense be excoriated, and that in the body of the actual criminal.

78. Kent Greenawalt, Law and Objectivity, 187, 189–90 (1992).

is for reparative theories such as rehabilitation. To justify criminal punishment, we require an epistemological foundation for which punishments, and to what extent, we may carry out. This means that we must know not only what any particular punishment will likely accomplish, both for its subject and for society, but why we may apply it in the first place. We must acknowledge our knowledge of social norms: efficacy alone does not satisfy the knowledge requirement for a social practice as profound as criminal punishment.

All the theories of punishment work from the fundamental intuition that harmful acts—above all, malevolent acts—are condemnable. This is a reasonable moral premise; no society can tolerate crimes without a condemnatory response. Injustices burrow ineradicably into our memories, and the urge to see wrongdoing redressed in some fashion cannot be denied. People must be accountable for their illegal acts.[79] Without condemnation of offensive acts, morality becomes a mere suggestion. When these acts are intentional and malicious, accountability entails the adverse experience of punitive sanctions in order to indicate social condemnation and revulsion.[80] Hence, a reason for punishment is that it is the inevitable conclusion establishing a moral "truth." The truth of a moral proposition is effectively denied when immoral actions are permitted to go unaddressed. This is not mere metaphysics; it is the most practical thing. The moral values of a society are inconsequential, and insubstantial, if the moral quality of individual actions is left unevaluated.

Yet, for all that criminal punishment as an idea is rationally indispensable to repudiate immoral behavior, it critically suffers from an epistemological deficiency.[81] Even if punishments worked just as predicted, we still would not *know* which punishments were *right* to apply. We would only know what results they appeared to produce.

---

79. *See* Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 473, 486 (1993). Although his conclusions differ somewhat from the arguments presented here, Dagger makes compelling observations about both the purpose of punishment and the difficulty of determining its proper form and quotient.

80. Vivienne O'Connor, *Defining the Rule of Law and Related Concepts*, available on-line at INPROL (International Network to Promote the Rule of Law) Publications (Feb. 18, 2015).

81. Michael Davis, *How to Make the Punishment Fit the Crime*, *in* CRIMINAL JUSTICE, Nomos XXVII (J. Roland Pennock & John W. Chapman eds., 1985).

Knowledge, in relation to values, poses a particular epistemological challenge distinct from other types of knowledge claims. Values are cultural and personal (these are often, but not always, the same because values are typically learned). People can plausibly maintain that they know their values, but these epistemological claims are not equivalent in their demonstrability with logical or scientifically testable propositions.[82]

Values pertain to actions. To "know" a value means to know something about an action, whether it should be done and how. Values are beliefs about proper and improper behavior. To know values is therefore also to know what acts are in accord with, or offensive to, particular values. We do not know values only in the abstract; rather, they inform us about our actions. If we "know," as a value, that life should be preserved and suffering reduced, then we know that we *should act* to help those who are in danger or pain. How, when, to what degree, we must act on our values is not always precisely clear, but what we do know from our values is that they must be realized in actions.

Still another aspect peculiar to knowledge claims of values is that they frequently conflict over the proper action for a specific situation. This stems partly from the fact that different people hold somewhat different values, even within a particular culture. Another reason for conflict is that situations can be morally complex and ambiguous. One person's fulfillment through artistic expression is another person's affront. Both people may well share the values supporting artistic freedom and free expression.

82. In his discussion of "moral knowledge," Robert Audi observes: "[W]hereas there is a widespread tendency to take for granted that there is much scientific knowledge, there is a widespread inclination to take moral judgments to be at best culturally conditioned assumptions with no claim to genuine truth. . . . Consider the judgment that cruelty to children is wrong. A clear example would be the judgment that it is wrong to thrash a three-year-old for accidentally spilling milk. We accept this, but do we know it? Suppose someone denies it or simply asks us to justify it. It does not appear that we can establish it scientifically. It is apparently not a scientific judgment in the first place. Furthermore, it is not in any obvious way a judgment grounded in perception; and it is grounded in reason, it does not seem to be so in the straightforward way the representative self-evident truths . . . apparently are. Many find it natural to consider this judgment to be grounded in our culture and to be accepted simply as part of the social fabric that holds our lives together. It would then be a socially accepted judgment but would not express social knowledge." Robert Audi, Epistemology: A Contemporary Introduction to the Theory of Knowledge 308 (3d ed. 2011).

They may also agree the people ought not gratuitously to offend others. Yet their perceptions of their actions in relation to their values clash.

The collisions between values are evident in our responses to crime. Criminal laws are one expression of social values. This is not to say that criminal laws, like other social values, are free of debate within a given society. We know, from our knowledge of our values, that bad acts, such as crimes, should be discouraged, thwarted, or condemned. Yet the actions we deem proper in response to crimes are frequently acts that we would otherwise oppose, such as using violence in self-defense or the defense of others, or detaining people and ultimately punishing them.

The "right" answer to such value-act conflicts can often be found in our values themselves. Our values tell us, to some extent, how to rank acts in relation to one another. We rank values in relation to one another from our perspective of the values themselves.[83]

Moral tenets do not suffice as a corpus of regulatory guidelines for criminal punishment. They do not instruct us on what we need to know to enact actual punishments. Although the lack of demonstrable limitations on criminal punishment does not mean that we ought to abandon punishment all together, neither does it support the conclusion that society may therefore punish at whim. And that is the problem: without an epistemological basis for determining the form and duration of punishments, criminal sentencing is just that—a whim.

What we can know about criminal punishment? A society may have a strong consensus about what acts should be designated as crimes. Its members may generally agree about what acts are morally and legally permissible to prevent or combat imminent crimes. Lastly, they may also know that those crimes that could not be prevented in the past must be condemned and discouraged in the future. But shared knowledge of values becomes more doubtful, the more removed the response to a crime. The conflict of values and the consequent recommended actions becomes more ambiguous and difficult to resolve where the response is not so much rectification as reprobation.

83. Value conflicts are by no means free of controversy. They expose divergent views about what otherwise appear to be common "knowledge." Some people in a society might believe that an "innocent" victim of violence may use violence in self-defense against the "guilty" perpetrator in fulfillment of a value of preserving life or well-being. Others, though, might interpret the same values as leading to a different conclusion: that victim's may not favor their well-being over that of another through violence.

How can we know how to punish crimes or even that crimes should be punished? A simple answer is that the law tells us so. In this case, our knowledge comes from a set of social rules whose authority we accept—whether we believe that these rules derive from a deity, or custom, or the wisdom of the people as carried out by their government. Whatever the source of the law, we treat it as essentially a deontological corpus, a given order by which we must abide.

But this neat response is unsatisfactory in a democracy or in any society that recognizes its laws to be mutable, temporal, and the product of social contestation. Where the authority to create law is not imposed from without but is understood as immanent, a society requires a deeper epistemological foundation for criminal punishment. Hence the sundry theories of punishment that try to delve further into the justification of punitive practices.

We need also to attend to other considerations that we know will bear on punishment. A critical factor, one that I examine in more detail elsewhere, is the existence of legal rights. How do we reconcile the experience imposed on the convicted criminal with other social "truths," such as common moral ideas and such social institutions as legal rights?[84] Crimes are often offenses against rights, depending on the rights a society recognizes.[85] In addition, a crime insinuates fear into a society, such that people refrain from using their rights to the full extent.[86] Therefore, punishment can be justified as a method to help protect rights. Yet criminal punishment can likewise offend against the rights of the subject. Rights thus limit the duration and kinds of legally permissible punishment, just as they likewise necessitate the application of punishment. The tension between rights and punishment has long been acknowledged.[87] Whatever

84. HART, PUNISHMENT AND RESPONSIBILITY, *supra* note 1, at 159ff; Dolinko, *supra* note 10, at 406–07.

85. "Often," not "always," because some crimes do not directly intrude on rights. The government may make it a crime of trespassing if an unauthorized person wanders onto a government intelligence-gathering site. Admittedly such a crime is not divorced from the public's interest—the government will argue that the operation protects the public—but it does not directly intrude on any individual's interests. Nonetheless, most crimes against individuals or social groups do impinge on personal rights.

86. Mark A.R. Kleiman, *Toward Fewer Prisoners & Less Crime*, 139(3) *DAEDALUS: ON MASS INCARCERATION* 116 (Summer 2010).

87. The usual justifications for punishing despite rights, compelling state interest or rational basis, are normative and practical arguments. They bear a great deal of persuasive appeal, yet they do not address the epistemological problem of proving that we know that one

a society knows about its particular system of rights may not be compatible with what it believes about crimes and criminal punishments.

These dangers are evident in the present day. When judges sentence people to prison, the sentences they hand down do not explicitly incorporate the actual conditions of what prisoners will actually experience. Incarceration is all too often the setting for the very crimes, including murder and rape, which society most determinedly punishes.[88] Judges have little control over the living conditions of the individual prisons within their jurisdiction. The judicially expounded sentence is but an idealized sketch of what actually happens in prisons. Judges, correctional officials, elected politicians, and the public all know that these crimes occur in prison.[89]

There is a disjunction between the justifications for punishment and its actuality.[90] In light of what the experience of criminal punishment can truly involve, the retributivist must agree that, if the true conditions of prison represent the wonted retributive penalty, then those conditions should be an express part of the formal sentence. Just so, if the proponent of deterrence finds that the dangers and psychological deterioration of prison life are proper, then he or she must allow that a true accounting of these conditions should be incorporated into every criminal sentence, and readily publicized before the population at large. If we know anything about the real state of criminal punishment, it is that it is far more brutal than the prescribed sentences. Our society tolerates a continuing

state practice (punishment) can outweigh another state concern, upholding legal rights. If it is "reasonable" for the state to limit the rights of criminals in order to protect the rights of others, we must be able to say how we know that this reasonableness is a sufficient justification. Moreover, we must be able to explain how we know how rights may be reduced by punishment. *See* the discussion in HUSAK, *supra* note 20, at 122–32. Husak questions these two standards on different grounds. *See, too* Dirk van Zyl Smit, *Regulation of Prison Conditions*, *in* 39 CRIME AND JUSTICE: A REVIEW OF RESEARCH 503, 504ff (Michael Tonry ed., 2010).

88. The notorious condition of imprisonment is not peculiar to the United States. Other nations have witnessed public alarm at the state of their prison systems. A recent in-depth journalistic report has documented the routine dangers facing inmates in German prisons. Martin Kotynek, Stephan Lebert, & Daniel Mueller, *Die Schlechterungsanstalt*, DIE ZEIT 13–15 (Aug. 16, 2012).

89. A number of recent studies have documented the deleterious conditions of American prisons. Among them are: U.S. Bureau of Prisons: *Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743 (Sept. 2012); Jeffrey Fagan, *The Contradictions of Juvenile Crime and Punishment*, 139(3) DAEDALUS: ON MASS INCARCERATION 43 (Summer 2010).

90. FERGUSON, *supra* note 27, at 15–16.

discrepancy between the judicial knowledge of appropriate punishment and the fact of its practice.

As it stands, our present system of punishment betrays a tacit, if glaring, confusion about the purpose of criminal punishment. For reasons that would seem to be less rational than reactive, there has been a drift toward compounding criminal penalties. From public registrations of released sexual offenders to statutory debarment provisions, many crimes are punished more than once through a telescoping system of cumulative punishments. The logical connection between these statutory strictures and bars and the judicially imposed sentences remains unclear. If the prison term is insufficient to the crime, why was it imposed in the first place?

For example, the origin of Section 411 of the Employee Retirement Income Security Act of 1974 (ERISA) lies in the history of ploys by dishonest union officials.[91] The wording of ERISA § 411 tracks the phrasing of Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[92] to protect union employee benefit plans from being used as shelters for unreconstructed ex-convict union officials. After completion of his criminal sentence, a convicted union officer was often reabsorbed into the governing echelons of a union, only shifted into a position that was not statutorily closed to him.[93]

If a term of incarceration for sexual predators is known to be ineffective, then why do they receive such sentences in the first place? Are we being consistent with our ideas of trial and punishment when we leave a convicted sexual offender open to the fury of the public by publicizing his location after his release?

CONCLUSION

Criminal punishment is an unusual species of legally determined action. The state is granted no comparable power of concerted negative treatment in relation to the population—outside, perhaps, of conducting war. Civil law is no less an artifact of the state, but the state's role in its enforcement is

91. 29 U.S.C. § 1111.

92. 29 U.S.C. § 504. "LMRDA: Interpretation of the 'Advice" Exemption," Fed. Reg. Vol. 76, No. 119 36178, 36179 (2011).

93. Presser v. Brennan, 389 F.Supp.808, 813 (ND Ohio, 1975).

far more constrained. Individuals are required to follow the laws, through qualified representatives (legal counsel admitted to the local bar), within the forum provided by the state (the courts), and under the aegis of legally trained monitors and arbiters (judges).

Criminal prosecutions, on the other hand, bring in the state in force. Criminal violations become the concern of the state, not the option of the citizen. When a defendant is found guilty of a crime, the result is usually punitive, nor merely corrective. This indicates that the very idea of justice in a criminal matter is different from the theme of redress, of making whole, that underlies civil litigation. Criminal punishment is the ultimate step in enforcement of criminal laws; arrest and prosecution culminate for those found guilty not in the verdict, but in the imposition of a sentence. The main argument for punishment is that crimes are *offenses* against society, whose protector is the state. That is, crimes are ill-meant or indefensibly thoughtless harms, not mere accidents. Correcting the act is not enough; crimes are not to be repaired, but to be repented. The conscious actor who chose to disregard (or ignore) the law and to hurt others must be brought to account.

The predominant theories of criminal punishment diverge in the *reasons* they propose for criminal punishment, but they generally share a perception of, or at least a tolerance for, its *practice.* What nearly all these theories lack, however, is an explanation for how they know how punishment should occur, and this is a grave fault, particularly in a democracy. Investing the state with the power to punish without *knowable*, well-grounded delimitations is to dispense with the rule of law precisely at a point where it is most exigent.

The gap in criminal punishment theory is admittedly difficult to redress. Epistemological arguments for how we know logical truths or facts about the physical world do not quite serve in the realm of normative "principles" for human behavior. The very nature of the needed epistemological defense is elusive. To base it solely on norms risks slipping into a tautology: we know that our behavior is right because we know our behavior is founded on what we know is right. Nonetheless, if society is to punish criminal violations, it must act from as much knowledge as can be found. The necessity in criminal law for rigorous epistemological standards does not end with the presentation of sufficiently probative evidence of the criminal's relation to the crime. It is no less crucial for the state's disposition of the criminal after his conviction.